Eu Kim Kee @ Yeo Siong Kwei dan lain-lain lwn Berjaya Times Square Sdn Bhd (dahulunya dikenali sebagai Berjaya Starcity Sdn Bhd dan sebelum itu dikenali sebagai Berjaya Ditan Sdn Bhd)

MAHKAMAH TINGGI (KUALA LUMPUR) — SAMAN PEMULA NO S2–24–3046 TAHUN 2001
ABDUL HAMID SAID H
6 MAC 2002

Kontrak *— Kontrak bangunan — Lewat siap — Bila kausa tindakan terakru — Ganti rugi — Tolakan — Sama ada plaintif berhak mendapatkan penghakiman deklarasi*

Plaintif, pembeli-pembeli hartanah, telah memasuki satu perjanjian jual beli ('PJB') bertarikh 11 Ogos 1995. Menurut kl 22, milikan kosong hendaklah diserahkan kepada mereka pada atau sebelum 10 November 1998 iaitu 36 bulan daripada tarikh tandatangan perjanjian. Setakat 20 Julai 2001, defendan telah kelewatan 983 hari. Oleh kerana plaintif belum membayar defendan mengikut PJB sejumlah RM128,390 dan yang dihutang defendan kepada plaintif adalah RM414,928.34, maka plaintif memohon satu deklarasi bahawa mereka berhak menolak jumlah terakru kepada plaintif daripada jumlah yang kena dibayar plaintif kepada defendan apabila hartanah diserah hakmilik. Oleh itu, defendan patut membayar plaintif RM286,538.34 setakat 20 Julai 2001. Defendan di dalam pembelaannya mengatakan plaintif tidak berhak pada ganti rugi tertentu kerana kausa tindakan belum timbul sebab walaupun pelanggaran PJB berkaitan pemberian milikan kosong telah berlaku, tetapi tarikhnya belum ditetapkan. Berlatarbelakangkan fakta di atas, isu-isu berikut telah dikemukakan untuk keputusan: (i) sama ada tuntutan ini pra matang dan oleh yang demikian tidak mendedahkan sebarang kausa tindakan; dan (ii) sama ada mahkamah mempunyai budi bicara untuk memberi pengisytiharan yang dipohon.

Diputuskan, membenarkan permohonan tersebut:

(1) Walaupun perlanggaran PJB berkaitan pemberian milikan kosong telah berlaku tetapi tarikh pemberian milikan kosong belum dapat ditentukan, tanggung rugi yang dialami oleh plaintif dalam kes ini boleh dijumlahkan. Mahkamah dalam kes *Insun Development* memutuskan bahawa 'It is clear law that in the absence of express contractual provision, the purchaser's right to sue for damages would accrue on the date of the breach of contract (see *Nasri v Mesah* [1971] 1 MLJ 32 at p 34) ... But, the parties to a contract are free to regulate or modify their rights in the event of breach thereof in such manner as to postpone the date of accrual of their right to sue for damages ... .' (lihat ms 189I, 191A–B)

(2) Dalam kes ini, adalah jelas bahawa perlanggaran terma dan syarat PJB telah berlaku apabila defendan gagal menyerahkan milikan

kosong. Tetapi ganti rugi yang ditetapkan ada permulaan tetapi tidak ada kesudahan atau hujungnya kerana pada masa tindakan ini dimulakan, tidak diketahui bila milikan kosong akan diserahkan. Plaintif tidak menuntut ganti rugi yang ditetapkan apabila milikan kosong diserahkan, tetapi ganti rugi yang terakru setakat baki harga belian premis berkenaan. Hak menuntut dan ganti rugi dapat dikira. Klausa 22.2 PJB berbeza dengan kl 12(1) Kedah-Kaedah tersebut. Klausa 22.2 PJB tidak mengatakan 'immediately after the delivery of vacant possession'. Klausa 22.2 PJB mengatakan 'shall pay immediately to the purchaser'. Seperti diputuskan dalam *Insun Develpoment*, saya '... have regard to the particular contract'. (lihat ms 191B–E); *Insun Development Sdn Bhd v Azali bin Bakar* [1996] 2 MLJ 188 diikut.

(3) Di Malaysia telah menjadi lumrah kebanyakan bangunan yang dibina lambat disiapkan. Ini menimbulkan masalah kepada pembeli terutama mereka yang berpendapatan rendah. Jika plaintif dikehendaki membayar RM128,000 ini, maka beliau terpaksa memikul beban hutang bank bertambahan. Akhirnya, plaintif terpaksa mengambil tindakan mahkamah. Ini boleh menyebabkan mereka menunggu bertahun-tahun atau pun tidak mendapat bayaran langsung kerana pemaju telah gulung tikar. Demi keadilan, adalah '... *manifestly unjust* ...' jika mahkamah tidak membenarkan tolakan di peringkat ini memandangkan hak plaintif telah terakru (lihat ms 191F–H); *SEA Housing Corp Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31 diikut.

(4) Hak plaintif telah terakru apabila defendan lambat menyerahkan milikan kosong seperti yang dipersetujui dalam PJB. Hakim yang bijaksana menggunakan budi bicara mahkamah kerana menafikannya pada masa ini akan membawa kepada ketidakadilan (lihat ms 192F); *Tan Beng Sooi v Penolong Kanan Pendaftar (United Merchant Finance Bhd, Intervener* [1995] 2 MLJ 421 diikut.

[English summary

The plaintiffs, purchasers of a property, entered into a sale and purchase agreement ('S&P') dated 11 August 1995. Pursuant to cl 22, vacant possession was given to them on or before 10 November 1998, which is 36 months from the date of signing the said agreement. As at 20 July 2001, Defendant had delayed for period 983 days. As the plaintiffs have yet to pay the defendant a sum in respect of the S&P in the amount of RM128,390 and a sum owing by the defendant to the plaintiff in the amount of RM414,928.34, the plaintiff seek a declaration that they are entitle to deduct the total amount accruing to the plaintiff from the amount due by the plaintiff to the defendant when the property is transferred. Wherefore, the defendant should pay the plaintiff a sum of RM286,538.34 as at 20 July 2001. The Defendant in its defence states that the plaintiff is not entitled to

A specific damages as the cause of action has not arose even though a default of the S&P in respect of the award of vacant possession had occurred, but the date has yet to be fixed. Based on the background of the above facts, the following issues were forwarded for decision: (i) whether this claim is premature and as such did not disclose any cause of action; and (ii) whether the court has the discretion to grant the declaration prayed.

Held, allowing the application:

(1) Despite the occurrence of default of the S&P in respect of the award of vacant possession, but the date of award of vacant possession have yet to be ascertained, the liability incurred by the plaintiff in this case may be computed. This court in the case of *Insun Development* held that 'It is clear law that in the absence of express contractual provision, the purchaser's right to sue for damages would accrue on the date of the breach of contract (see *Nasri v Mesah* [1971] 1 MLJ 32 at p 34) ... But, the parties to a contract are free to regulate or modify their rights in the event of breach thereof in such manner as to postpone the date of accrual of their right to sue for damages ...' (see pp 189I, 191A–B).

(2) In this case, it is evident that a default of the terms and conditions of the S&P had occurred when the defendant failed to surrender vacant possession. But the damages stipulated has its beginnings but have no end as at the commencement of this action, it is unknown when vacant possession will be surrendered. The Plaintiff did not claim damages stipulated when vacant possession was surrendered, but damages accrued as at the balance of the purchase price of the said premise. The right to claim damages may be computed. Clause 22.2 of the S&P is different from Clause 12(1) of the said Rules. Clause 22.2 of the S&P did not state 'immediately after the delivery of vacant possession'. Clause 22.2 of the S&P states 'shall pay immediately to the purchaser'. As decided in *Insun Develpoment*, I '... have regard to the particular contract'. (see p 191B–E); *Insun Development Sdn Bhd v Azali bin Bakar* [1996] 2 MLJ 188 is followed.

(3) In Malaysia it is known that delay occurs in most buildings that are being constructed. This causes problems to purchasers in particular the low income earners. If the plaintiff is required to pay this sum of RM128,000, he will be burdened with additional debts to the bank. Finally, the plaintiff had to take legal action. As a result they will have to wait years for their payment or not receive payment at all as the developer has been wound up. For the sake of justice, it is '... manifestly unjust ...' if the court does not allow deduction at this stage since the plaintiff's right has accrued (see p 191F–H); *SEA Housing Corp Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31 followed.

(4) The plaintiff's right accrued when the defendant delayed in giving vacant possession as agreed in the S&P. The learned judge applies the discretion of the court as denying it at this juncture will amount to injustice (see p 192F); *Tan Beng Sooi v Penolong Kanan Pendaftar (United Merchant Finance Bhd, Intervener* [1995] 2 MLJ 421 followed.]

Notes

Untuk kes-kes berkaitan kontrak bangunan, lihat 3 *Mallal's Digest* (4th Ed, 2000 Reissue) perenggan-perenggan 2150–2165.

Kes-kes yang dirujuk

Howard v Pickford Tool Co Ltd [1951] 1 KB 417 CA (dirujuk)
Ibeneweka v Egbuna [1964] 1 WLR 219 (dirujuk)
Insun Development Sdn Bhd v Azali bin Bakar [1996] 2 MLJ 188 (diikut)
Loh Wai Lian v SEA Housing Corporation Sdn Bhd [1987] 2 MLJ 1 (dirujuk)
Nasri v Mesah [1971] 1 MLJ 32 (dirujuk)
SEA Housing Corporation Sdn Bhd v Lee Poh Choo [1982] MLJ 31 (diikut)
Tan Beng Sooi v Penolong Kanan Pendaftar (United Merchant Finance Bhd, Intervener [1995] 2 MLJ 421 (diikut)

Undang-Undang yang dirujuk

Akta Had Masa 1953 s 6(1)
Akta Relif Spesifik 1950 s 41
Kaedah-Kaedah Pemaju Perumahan (Kawalan dan Perlesenan) 1970 p 12(1)
Kaedah-Kaedah Mahkamah Tinggi 1980 A 15 k 16

(*Lee & May*) bagi pihak plaintif.
(*Chooi & Co*) bagi pihak defendan.

Abdul Hamid Said H: Plaintif pembeli-pembeli hartanah ('plaintif') yang dikenali sebagai Parcel No 04–55, berukuran 694 persegi, Tingkat 4, Berjaya Times Square, Kuala Lumpur, yang dibina di bawah Geran No 7866 Lot 339 dan Geran 10798 Lot 145 dalam s 52, Bandar Kuala Lumpur ('premis tersebut') dengan harga RM1,283,900. Mereka memohon satu deklarasi bahawa mereka berhak kepada satu tolakan ('set off') menggunakan sebahagian daripada ganti rugi yang telah terakru kepada mereka.

Mengikut perjanjian jual beli ('PJB') bertarikh 11 Ogos 1995, di kl 22, premis itu akan diserah kepada plaintif dalam tempoh 36 bulan daripada tarikh perjanjian. '... Provided always that the purchaser shall irrevocably grant to the developer an extension of three (3) months from the expiry of

A the 36 month period (extended period) in the event that vacant possession of the premises is not handed over to the purchaser within the 36 month period' (kl 22.1). Dengan hal demikian, milikan kosong hendaklah diserahkan pada atau sebelum 10 November 1998 iaitu selepas 39 bulan dari tarikh tandatangan PJB.

B Setakat 20 Julai 2001, defendan telah kelewatan 983 hari. Dan jika dikira ganti rugi yang patut dibayar defendan mengikut PJB dikira, iaitu 983 dibahagikan dengan 365 x 12% x RM1,283,900 = RM414,928.34. Ganti rugi selanjutnya akan dikira daripada 21 Julai 2001 hingga tarikh milikan kosong diberi.

C Kes plaintif ialah oleh kerana jumlah yang belum dibayar kepada defendan mengikut PJB ialah RM128,390 dan yang dihutang defendan kepada plaintif berjumlah RM414,928.34, maka plaintif berhak menolak jumlah yang terakru kepada plaintif daripada jumlah yang kena dibayar plaintif kepada defendan apabila plaintif diserah hakmilik. Dalam perkataan lain, defendan dikehendaki membayar RM414,928.34 – RM128,390 = RM286,538.34 kepada plaintif setakat 20 Julai 2001.

D Defendan di dalam belaannya mengatakan bahawa plaintif tidak berhak kepada ganti rugi tertentu mengikut kl 22.2 PJB kerana kausa tindakan belum timbul. Dengan hal demikian, tindakan plaintif menuntut tolakan belum sampai waktu. Ini bermakna, kata defendan, hak plaintif menuntut ganti rugi bermula selepas milikan kosong diserahkan.

E Klausa 22.2 PJB berbunyi:

> If the developer fails to hand over vacant possession of the premises within the extended period, the developer shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of twelve per centum (12%) pa of the purchase price from the date of the expiry of the
F extended period up to the day of delivery of vacant possession of the premises.

Sementara kl 22.3 PJB mengatakan bahawa jika milikan kosong diserah selepas 36 bulan tetapi dalam tempoh masa yang dilanjutkan (iaitu dalam tempoh 39 bulan) plaintif bersetuju: 'that no claim shall be maintained or instituted against the developer for any damages, loss, interest, costs and
G expenses ...'

Berlatarbelakangkan fakta di atas, isu-isu berikut telah dikemukakan untuk keputusan:

(1) sama ada tuntutan ini pra matang dan oleh yang demikian tidak mendedahkan sebarang kausa tindakan;

H (2) sama ada mahkamah mempunyai budi bicara untuk memberi pengisytiharan yang dipohon.

Isu pra matang

Di dalam hujahnya, defendan mengatakan plaintif tidak boleh
I menggunakan kl 22.2 PJB pada masa ini kerana walaupun perlanggaran PJB berkaitan pemberian milikan kosong telah berlaku, tetapi tarikh pemberian milikan kosong belum dapat ditentukan.

Bagi menyokong cadangannya di atas, peguam defendan memetik keputusan Privy Council dalam kes *Loh Wai Lian v SEA Housing Corporation Sdn Bhd* [1987] 2 MLJ 1.

Di dalam kes *Loh Wai Lian*, rumah kedai yang dibeli tidak siap dibina seperti dijanjikan pada 18 September 1975. Serahan milikan kosong berlaku pada 7 November 1977. Pada 21 April 1980, perayu menuntut bayaran RM29,972.01, iaitu 8% daripada harga penuh bangunan iaitu RM175,000 atas kelewatan lima bulan 21 hari. Perayu memohon penghakiman ingkar dan penolong kanan pendaftar berkenankan permohonan perayu. Responden merayu kepada Mahkamah Tinggi dan telah diberkenankan. Rayuan plaintif/perayu selanjutnya telah ditolak oleh Mahkamah Persekutuan. Majlis Privy berkenankan rayuan perayu dan di dalam keputusannya, Majlis Privy memutuskan di ms 1:

> (2) the only sensible construction of cl 17 is that it imposes an obligation to pay in substitution for any other right to damages which the purchaser might otherwise have, a single sum to be calculated and ascertained at a particular date and that until that sum has been ascertained it does not become due and cannot be sued for ...

Dalam *Loh Wai Lian*, Majlis Privy memutuskan di ms 3–4:

> ... Secondly, the formula for calculation of the indemnity was modified by specifying not only the *terminus a quo* as provided in the rule but also *terminus ad quem*, that is to say, the actual completion and delivery of possession ... 'agreed liquidated damages' was to make it clear that the purchaser was not to have any right to any other payment by way of damages in respect of the delay over and above what the vendor was undertaking to pay ... .

Prinsip 'bila tindakan bermula (*terminus a quo*) dan bila tindakan berakhir (*terminus ad quem*)' telah diikuti Mahkamah Persekutuan dalam kes *Insun Development Sdn Bhd v Azali bin Bakar* [1996] 2 MLJ 188. Tetapi Mahkamah Persekutuan dalam kes ini membezakan keputusannya dengan kes *Loh Wai Lian* kerana kes Mahkamah Persekutuan mendapati pembeli telah melanggar s 6(1) Akta Had Masa 1953. Apabila dibandingkan dengan *Loh Wai Lian*, Mahkamah Persekutuan membuat pemerhatian soalan terpenting bagi Majlis Privy ialah 'when the cause of action did accrue, having regard to the particular contract before them ...'.

Dalam kes *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31, Mahkamah Persekutuan memutuskan di ms 34: '... plaintiff did not breach the agreement when she withheld payment of the money demanded by the defendant.'

Tanggung rugi yang dialami plaintif dalam kes ini boleh dijumlahkan. Mahkamah Persekutuan juga memetik perenggan (r) k 12(1) Kaedah-Kaedah Pemaju Perumahan (Kawalan dan Perlesenan) 1970 ('Kaedah-Kaedah tersebut') yang mengatakan yang jelas tanggung rugi kerana kelewatan serahan milikan kosong bermula '... *immediately after the delivery of vacant possession as specified in the central of sale*'. Tetapi kes di hadapan saya tidak melibatkan mana-mana Akta dan kaedah yang disediakan oleh pihak berkuasa.

Mahkamah Persekutuan dalam kes *Insun Development* memutuskan di ms 196:

> It is clear law that in the absence of express contractual provision, the purchaser's right to sue for damages would accrue on the date of the breach of contract (see *Nasri v Mesah* [1971] 1 MLJ 32 at p 34) ... But, the parties to a contract are free to regulate or modify their rights in the event of breach thereof in such manner as to postpone the date of accrual of their right to sue for damages which, of course, was what happened in *Loh Wai Lian*.

Di dalam kes di hadapan saya, adalah jelas bahawa perlanggaran terma dan syarat PJB telah berlaku pada 10 November 1998 apabila defendan gagal menyerahkan milikan kosong. Tetapi ganti rugi yang ditetapkan ada permulaan tetapi tidak ada kesudahan atau hujungnya kerana pada masa tindakan ini dimulakan, tidak diketahui bila milikan kosong akan diserahkan.

Klausa 22(1) dan (2) PJB berbeza daripada klausa yang biasa. Dalam kl 22(1), pembeli menerima bahawa milikan akan diserah dalam tempoh 39 bulan tanpa mendapat tuntutan ganti rugi yang ditetapkan selepas 36 bulan. Untuk mengimbangi kl 22(1), defendan memasukkan kl 22(2) dengan memberi faedah 12% dan juga '... the developer shall pay immediately to the purchaser liquidated damages ...'.

Dalam kes di hadapan saya, plaintif tidak menuntut ganti rugi yang ditetapkan apabila milikan kosong diserahkan, tetapi ganti rugi yang terakru setakat baki harga belian premis berkenaan. Hak menuntut dan ganti rugi dapat dikira. Klausa 22.2 PJB berbeza dengan kl 12(1) Kedah-Kaedah tersebut. Klausa 22.2 PJB tidak mengatakan 'immediately after the delivery of vacant possession'. Klausa 22.2 PJB mengatakan 'shall pay immediately to the purchaser'. Seperti diputuskan dalam *Insun Develpoment* saya '... have regard to the particular contract'.

Berkaitan hak tolakan, ianya telah diputuskan dalam kes *Lee Poh Choo*. Kes ini memutuskan 'It would be manifestly unjust to allow the defendant to enforce payment without taking into account the plaintiff's cross claim.'

Di Malaysia telah menjadi lumrah kebanyakan bangunan yang dibina lambat disiapkan. Ini menimbulkan masalah kepada pembeli terutama mereka yang berpendapatan rendah. Jika plaintif dikehendaki membayar RM128,000 ini, maka beliau terpaksa memikul beban hutang bank bertambahan. Akhirnya, plaintif terpaksa mengambil tindakan mahkamah. Ini boleh menyebabkan mereka menunggu bertahun-tahun atau pun tidak mendapat bayaran langsung kerana pemaju telah gulung tikar. Demi keadilan, adalah '... manifestly unjust ...' jika mahkamah tidak membenarkan tolakan di peringkat ini memandangkan hak plaintif telah terakru.

Dekri pengisytiharan

Seksyen 41 Akta Relif Spesifik 1950 menyebut:

> Any person entitled to any legal character or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title

to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:

Dan dalam menerangkannya dalam *ILBS Handbook Series*, ia mengatakan di perenggan 41.5:

(1) The jurisdiction of a Malaysian court to grant declaratory relief springs from two sources. First there is the statutory basis to be found in s 41 of the Specific Relief Act 1950. The procedural adjunct to the statutory basis is to be found in O 15 r 16 of the Rules of the High Court 1980.

(2) As far as declaratory judgments are concerned, it is established law that the power to make declaratory judgments is a discretionary one which should be exercised with care and caution and granted sparingly and judicially with regard to all the circumstances of the case. The court will also not make a declaratory judgment where the question raised is purely academic (see *Howard v Pickford Tool Co Ltd* [1951] 1 KB 417 (CA)) or where the purpose of seeking a declaration is to cause delay.

Viscount Radcliffe dalam memberi keputusannya dalam kes *Ibeneweka v Egbuna* [1964] 1 WLR 219 memutuskan di ms 225 bahawa:

... where it is a question of defining rights of two parties, is almost unlimited; I might say only limited by its own discretion. This discretion should, of course, be exercised judicially but it seems to me that the discretion is very wide. ... that judicial pronouncements ought not to be issued unless there are circumstances that call for their making.

Malaysian Court Practice — High Court berkaitan A 15 k 16 Kaedah-Kaedah Makhamah Tinggi 1980 yang memetik kata-kata Lord Radcliffe di atas mengatakan '... The court has power to grant a declaration irrespective of whether an application has a course of action or not and even if the cause of action does not exist at the time of the filing of an application' (see *Tan Beng Sooi v Penolong Kanan Pendaftar (United Merchant Finance Bhd, Intervener)* [1995] 2 MLJ 421).

Hak plaintif telah terakru apabila defendan lambat menyerahkan milikan kosong seperti yang dipersetujui dalam PJB. Saya menggunakan budi bicara mahkamah kerana menafikannya pada masa ini akan membawa kepada ketidakadilan.

Saya membenarkan permohonan plaintif di perenggan-perenggan (1), (2), (3), (4), RM286,538.34 di kandungan (1), serta kos.

Permohonan dibenarkan dengan kos.

Dilaporkan oleh Ezatul Zuria Azhari